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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 653

THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY,

Petitioner,

against

ANTOINETTE CONTINO AND MICHAEL A. CONTINO, TO THEIR OWN USE AND TO THE USE OF THE FIRE ASSOCIATION OF PHILADELPHIA,

Respondents.

PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

Petition and Brief

	PAGE
Summary Statement of Matter Involved	1
Ground of Jurisdiction	4
Questions Presented	5
The History of the Case	5
The Right of the Defendant to Have a New Trial	7
Reasons Relied Upon for the Allowance of the Writ	10

Transcript of Record

Opinion, United States District Court for the District of Maryland	1
Order of Court Dismissing Action	20
Plaintiff's Exhibit No. 2	20
Plaintiff's Exhibit No. 3	22
Plaintiff's Exhibit No. 4	23
Plaintiff's Exhibit No. 5	24
Testimony of Michael A. Contino	25
Testimony of Walter C. Hopkins	28
Testimony of George Louis DePaul, Jr.	30
Testimony of Eber W. Weinland	34
Testimony of Walter C. Hopkins, cross examination	35
Testimony of John R. Colgan	39
Testimony of Eber W. Weinland, direct examination	41

PAGE

Proceedings in the United States Court of Appeals for the Fourth Circuit on the first appeal 43

Opinion, United States Court of Appeals for the Fourth Circuit (first Opinion) 44

Judgment, United States Court of Appeals for the Fourth Circuit (first appeal) 50

Petition of The Baltimore and Annapolis Railroad Company to amend Order of Remand 51

Exhibit 1 to aforegoing Petition 54

Answer to aforgoing Petition 59

Order of United States Court of Appeals for the Fourth Circuit denying the aforegoing Petition 60

Docket Entries, United States District Court for the District of Maryland 61

Defendant's Motion for Leave to File Amended Pleading 62

Defendant's Amended Answer 63

Answer to Motion for Leave to File Amended Pleadings 68

Motion of Defendant that case stands for trial *de novo* 69

Defendant's Proffer of Testimony 70

Order of Judgment, entered by United States District Court for the District of Maryland 74

Proceedings in the United States Court of Appeals for the Fourth Circuit on the second appeal 75

Opinion of the United States Court of Appeals for the Fourth Circuit on the second appeal 76

Judgment of the United States Court of Appeals for the Fourth Circuit on the second appeal 78

PAGE

Stipulation as to Transcript on Petition for Certiorari 79

Certificate of Clerk of United States Court of Appeals for the Fourth Circuit 80

Order Extending Time for Filing Petition for Writ of Certiorari 81

TABLE OF AUTHORITIES CITED

Cases

Feldman v. Connecticut Mut. Life Ins. Co., 57 F. Supp. 70 (E. D. Mo. 1944) 14

Helis v. Ward, 308 U. S. 365 (1939) 10

Jones v. St. Paul Fire Ins. Co., 108 F. 2d 123 (C. C. A. 5th 1939) 14

Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257 (1910) 10

Miller Mutual Fire Ins. Assn. v. Bell, 99 F. 2d 289 (C. C. A. 8th 1938) 14

Saunders v. Shaw, 244 U. S. 317 (1917) 10

Southern Railway Co. v. Colonna, 64 F. 2d 237 (C. C. A. 4th 1933), *cert. denied*, 289 U. S. 762 (1933) 14

General Authorities

36 Corpus Juris Secundum 491, Federal Courts §301 14

3 Moore's Federal Practice (New Edition) §15.11 14

Statutes

Article 89B Annotated Code of Maryland, Sec. 85 7, 14

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

SUMMARY STATEMENT OF MATTER INVOLVED

This case presents for review certain proceedings, judgments, rulings and orders of the United States Court of Appeals for the Fourth Circuit in the purported exercise of its appellate jurisdiction in acting upon issues and matters of law and procedure brought before it in the course of the following proceedings:

(a) An appeal by the Plaintiff (Respondent here) from a judgment of the United States District Court for the District of Maryland in favor of the Defendant (Petitioner here) dismissing the case (Tr. 1, 20).

(b) A further appeal in the same case by the Defendant (Petitioner here) from the action taken by the said District Court in purported obedience to the mandate of the Court of Appeals in the appeal above referred to whereby the District Court rendered summary judgment in favor of the Plaintiff (Respondent here) against the Defendant (Petitioner here) after denying a motion by the Petitioner for leave to amend the answer, and denying to the Petitioner any right to further proceedings by way of a new trial, and rejecting all testimony offered by the Petitioner in its defense; and thereby denying to the Petitioner any opportunity to be heard in its own defense on the new issues arising under the law of the case announced by the Court of Appeals.

The result of the above proceedings, as demonstrated below, is the imposition of absolute liability upon the Petitioner under rules of law which have never been proved applicable to Petitioner by any judicial proceedings, in that:

1. Upon the appeal first above referred to, the Court of Appeals reversed a judgment of the District Court for the Defendant (Petitioner here) upon the ground that the case had been tried and decided in that Court upon an erroneous theory of the law applicable to the facts appearing in the record. Thereupon, the Court of Appeals declared the true law of the case and remanded the case for further proceedings in accordance with the opinion, but without expressly ordering a new trial (Tr. 44). At this stage nothing in the opinion nor in the record furnished any factual basis upon

which to impute any liability to the Defendant under the law of the case as announced by the Court of Appeals.

2. Upon the remand of the case as aforesaid, the District Court interpreted the opinion and mandate as a directive from the Court of Appeals to limit further proceedings in the District Court to the entry of final judgment in favor of the Plaintiff; and as foreclosing and precluding any further proceeding by way of a new trial or the offering of any additional evidence by either the Plaintiff or the Defendant.

3. The Defendant, insisting upon the necessity of a new trial, raised the issue in the manner following:

(a) By filing a petition in the Court of Appeals reciting the construction which the District Court placed upon the opinion and mandate, as aforesaid, and its purpose to deny to the Defendant any further proceedings by way of a new trial, or any opportunity to offer additional evidence, purporting to act in the premises aforesaid in obedience to said opinion and mandate, unless the Court of Appeals should expressly direct such further proceedings; and praying for clarification of said opinion and mandate by including therein an express direction to the District Court to grant a new trial, or, at least, indicating that the District Court was free to grant or refuse a new trial in the exercise of its own discretion (Tr. 51). The Court of Appeals summarily denied said petition.

(b) Following the denial of the said Petition, by filing a motion in the District Court for leave to amend the answer by alleging facts deemed pertinent to its defense upon the new issues arising under the law of the case as so announced by the Court of Appeals in its said opinion (Tr. 62).

The District Court, in purported obedience to the mandate of the Court of Appeals in the premises aforesaid, denied said motion (Tr. 61).

(c) By making an offer, under the applicable rule, of facts which the Defendant was prepared to prove if granted a new trial and permitted to do so (Tr. 70).

The District Court rejected the offer, in purported obedience to the direction of the said mandate, and proceeded to enter summary judgment in favor of the Plaintiff (Tr. 74).

4. Upon appeal by the Defendant, the Court of Appeals affirmed the said judgment in a *per curiam* opinion (Tr. 76) without, however, advancing any pertinent or relevant reasons for its action; and thereby affirmed the validity of all of the rulings and actions of the District Court in the premises aforesaid, and finally denied to the Defendant its fundamental right of recourse to the judicial processes of the Federal Courts for the determination of its liability; mulcted the Defendant in damages for a tort it did not commit, and without trial; and thereby deprived it of its property without due process of law.

GROUND OF JURISDICTION

The jurisdiction invoked in this case under 28 U. S. C. §1254(1) is the supervisory power of this Court over decisions and actions of the United States Court of Appeals, which have so far departed from the accepted and usual course of judicial proceedings, and have so far sanctioned such a departure by the United States District Court for the District of Maryland, as to call for an exercise of this Court's power of supervision in order to protect the Plaintiff against a taking of its property without due process of law. The judgments and actions herein sought to be reviewed are:

The judgment and opinion of the United States Court of Appeals for the Fourth Circuit rendered in the case of *Contino v. The Baltimore and Annapolis R. R. Co.*, 178 F. 2d 521, decided December 23, 1949 (Tr. 44, 50).

The judgment entered December 18, 1950 and *per curiam* opinion of the same Court in *The Baltimore and Annapolis R. R. Co. v. Contino*, 185 F. 2d 932, decided December 18, 1950 (Tr. 76, 78).

QUESTIONS PRESENTED

1. Has the Petitioner, The Baltimore and Annapolis Railroad Company, been deemed liable in damages under facts forming no part of the record and never tried in a judicial proceeding in contravention of the rights of due process of law guaranteed by the Constitution of the United States?
2. Has Petitioner, The Baltimore and Annapolis Railroad Company, been denied its day in court for the presentation of defenses to the grounds of liability first announced by the Court of Appeals after the only trial of the facts in this case, in contravention of the rights of due process of law guaranteed by the Constitution of the United States?
3. Is the finding of liability of Petitioner, The Baltimore and Annapolis Railroad Company, in direct contravention of the laws of the State of Maryland and therefore violative of Petitioner's rights guaranteed it by the United States Constitution?

THE HISTORY OF THE CASE

The cause of action was an accident on a State highway occurring in a culvert in the bed of the highway under the tracks of the Petitioner, in Anne Arundel County, Maryland. The culvert was constructed by the State Roads Commission with a clearance lower than the average clearance in such

cases. A heavily loaded truck passing through in the dark caught the top of the culvert and was wrecked.

In the District Court the case was pleaded and tried by the Plaintiff on the theory that the culvert was a part of a railroad bridge, for the continued maintenance of which in a safe condition the Railroad in possession was responsible under the common law and the statutes of Maryland relating to railroad bridges over highways. The case was defended by Petitioner on the theory that the culvert was not in legal character a railroad structure but a part of the State highway planned and constructed by the State Roads Commission for the maintenance of which in a safe condition the Roads Commission was, under the laws of Maryland, exclusively responsible.

The District Court, sitting without a jury, rejected the Plaintiff's theory, adopted the Defendant's (Petitioner's) theory, and entered judgment for the Defendant. Upon appeal, the Court of Appeals rejected both theories and held that the case was governed by the law of joint *tort-feasors* in that the Railroad Company then in possession of the *locus in quo* was held to have participated with the State Roads Commission in the original design and construction of the dangerous condition; holding that while the State Roads Commission was primarily and originally responsible for the dangerous condition in the culvert, the said Railroad, having participated with the Commission by approving the plans of the Commission for the culvert and contributing to the expense of the construction, had abandoned its right to require the Commission to erect and maintain at its own expense the crossing of its line by the new road; and held that the said Railroad had thereby become a joint *tort-feasor* with the Commission.

The specific ground of liability found by the Court of Appeals was the failure to give adequate notice to persons using the State highway of the danger of the low ceilinged

culvert; and under the law of joint *tort-feasors* the said Railroad and the Roads Commission were held to be jointly and severally liable for failure in this respect regardless of a criminal statute of the State of Maryland forbidding the erection of warning signs on the highways by the said Railroad. Art. 89B Annotated Code of Maryland (1939) §85 (Tr. 57). Because of the said Railroad's asserted participation in the tort, it was held estopped from setting forth the prohibition of this statute and, therefore liable absolutely for failure to perform an act forbidden by the criminal statutes of Maryland.

The opinion of the Court of Appeals concluded: "The judgment of the District Court is reversed and the case is remanded for further proceedings in accordance with this opinion" (Tr. 50). The judgment of the Court used similar language. The District Court and the Court of Appeals construed this ambiguous and indefinite language to mean that the liability of Petitioner had been conclusively and finally determined; Petitioner was *not* entitled to a new trial and an opportunity to offer evidence with respect to the new law of the case interjected and applied for the first time by the Court of Appeals.

THE RIGHT OF THE DEFENDANT TO HAVE A NEW TRIAL

Assuming, *ex gratia*, that the law of the case as announced by the Court of Appeals was correct, and was conclusively and finally decisive as to the liability of the Railroad that "participated" with the State Roads Commission in the creation of the dangerous conditions by approving the plans of the Roads Commission and contributing to the cost of construction of the underpass, thereby "abandoning *its* right to require the Roads Commission to erect and maintain at its own expense the crossing"; and assuming, *ex gratia*, that by reason of *its* action in the premises aforesaid the

said Railroad became in law a joint *tort-feasor* with the Roads Commission, and "subjected *itself* to liability for damages" for failure to give notice of the danger, nevertheless the Petitioner Railroad *was not* the Railroad mentioned and referred to by the Court of Appeals in its opinion, findings and conclusions, nor was there anything in the pleadings, evidence, or on the record to show any legal or factual relationship between the Petitioner Railroad and the Railroad that committed the *tort* and thereby subjected *itself* to the absolute liability as found by the Court of Appeals. On the contrary, it clearly appeared, and the Court of Appeals in its last opinion so found, that the Railroad that committed the *tort* and subjected itself to absolute liability was a Railroad known as the Washington, Baltimore and Annapolis Electric Railroad Company (hereinafter called the W B & A) — not The Baltimore and Annapolis Railroad Company (hereinafter called the B & A), the petitioner herein; and it was, therefore, the W B & A that was charged with the duty to give warning under the decision of the Court of Appeals and was liable in damages for failure to do so.

It clearly appeared, therefore, that the Petitioner Railroad, the B & A, was not the Railroad which committed the *tort* which the Court of Appeals held to be the sole ground for holding it as joint *tort-feasor* with the Roads Commission. Whether or not the Petitioner was liable under the law of the case as announced by the Court of Appeals through some legal or factual relationship with the original *tort-feasor* is another question dependent upon facts which have never been tried in this case. The Court of Appeals offered no suggestion whatever on this point. Indeed, the record before the Court was barren of anything even remotely bearing upon the question. The existence *vel non* of such a relationship was a new issue presented for the first time by the opinion and decision of the Court of Appeals, the determination of which was in the nature of

things decisive of the liability or non-liability of the Petitioner under the rule of law announced by the Court.

If it had been permitted to do so, the Petitioner would have proved, among other things, that the joint *tort* committed by the Railroad referred to in the opinion of the Court (the W B & A) occurred in 1929 when the underpass or culvert was built by the Roads Commission, and that the Petitioner (the B & A) was not incorporated and organized until 1936. Petitioner would also have proved that the original *tort-feasor* (the W B & A) ceased to exist and was wound up in a bankruptcy proceeding in the United States District Court for the District of Maryland in 1935, at which time all of its railroad property was sold under foreclosure; and that the Petitioner, after its organization, acquired the railroad property formerly owned by the W B & A at the *locus in quo* in the year 1936, from a private party who had purchased it at the foreclosure sale of the bankruptcy proceedings of the W B & A (Tr. 70 et seq.)

However, upon remand, the District Court denied Petitioner's Motion to Amend its Answer, its application for a new trial and its proffer of proof (Tr. 61, 62) which were designed for the purpose of enabling Petitioner to obtain a hearing on its defense that it had not participated in the construction of the culvert and to that end to offer evidence with respect to all material facts as to its relationship *vel non* with the Company which had done so. The denial of this right by the District Court was affirmed on appeal by the Court of Appeals in a *per curiam* opinion stating, "Upon the new trial, after the case was remanded to the District Court, the Railroad endeavored to escape liability on a ground not broached or considered at the first trial. It offered to show that it was not in existence when the underpass was built." etc. (Tr. 76). The opinion then purports to determine on its merits the invalidity of

Petitioner's new defense as though a new trial had in fact been granted by the District Court, all testimony with respect to its defense had been admitted in evidence and the District Court had held that defense unsound on its merits. There was no new trial. There was no testimony admitted in evidence. Petitioner's motion for a new trial was denied (Tr. 62). Judgment was summarily entered for the Plaintiff against the Defendant.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The failure to have a further trial for the taking of additional evidence, in instances where the decision of an Appellate Court raised for the first time issues of fact not considered at the original trial, has often been declared violative of due process requirements of either the Fifth or the Fourteenth Amendment by this Honorable Court, as, for example, where such failure prevented the losing party from offering evidence in rebuttal to evidence declared admissible for the first time by the Appellate Court, *Saunders v. Shaw*, 244 U. S. 317 (1917); where the decision of the Appellate Court, contrary to the decision of a collateral equity proceeding below, held inadmissible, as equitable defenses, the losing party's defenses interposed in an action at law, *Lutcher and Moore Lumber Co. v. Knight*, 217 U. S. 257 (1910); and where the Appellate Court has decided the merits on facts not contained in the record and on a theory which had never been tried by the litigants. See *Helis v. Ward*, 308 U. S. 365 (1939).

The *Saunders case, supra*, involved a suit for an injunction by a landowner against the collection of a drainage tax in which the plaintiff attempted to introduce evidence to the effect that his land could not possibly be benefited by the drainage project. The lower court had held this evidence inadmissible but had allowed it to remain upon the record. The appellate court first affirmed a judgment

for the defendant, a bond holder whose bonds were to be paid from the drainage tax, but, upon a rehearing, reversed the judgment on the basis of an intervening decision by the Supreme Court of the United States to the effect that plaintiff's evidence as to benefit was admissible. The defendant, after being denied a rehearing, petitioned for certiorari to the Supreme Court on the grounds that he had been denied a day in court for the introduction of evidence to rebut plaintiff's evidence concerning benefit. The Supreme Court, through Mr. Justice Holmes, stated:

> He now brings this writ of error and says that he has been deprived of due process of law, contrary to the 14th Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The chief justice and Mr. Justice O'Niell were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the case was within the principle of the Myles Salt Co. case that to remand it would be an empty form, — a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

In the *Lutcher Case, supra,* an action at law involving title to real estate, the defendants had brought a collateral suit in equity to enjoin the action at law on the grounds that their defenses in said action were all equitable defenses and that they, therefore, had no adequate remedy at law;

the equity court held that the defendant's defenses were not equitable defenses and dismissed the proceeding. Thereafter, in the law action, much of defendant's evidence was held inadmissible as not in conformity with the pleadings and the trial court rendered a judgment in favor of the defendants; this judgment was affirmed by the Court of Appeals but on the ground that defendant's defenses were inadmissible not because of lack of conformity with the pleadings but because such defenses were equitable defenses which could not be interposed in an action at law. On certiorari to the Supreme Court, it was held through Mr. Justice White that refusal by the lower court to have a further trial contravened the defendant's constitutional rights:

> Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the circuit court of appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard.

In the *Helis Case, supra,* the vendors under a contract for sale of mineral rights, had brought suit for specific performance, asserting that the purchasers should have paid the higher of two alternative purchase prices under the contract. The applicable purchase price, according to the contract terms, depended upon the potential output of an oil well as determined by an independent mineral engineer. The trial court dismissed on the basis that the lower purchase price which defendant had already paid, was the applicable price under its construction of the purchase contract, and the defendant, therefore, accepted without objection the factual findings of the mineral engineer. Upon the Appellate Court's reversing this judgment on the basis of a different construction of the purchase contract with

directions to enter judgment for the higher price, the plaintiff insisted there should be a further trial in order to allow him to raise objections and present evidence against the factual finding of the mineral engineer. The Supreme Court, although denying plaintiff's contention, for procedural reasons, upheld the rule of law announced in the *Saunders case, supra,* in an opinion by Mr. Justice Douglas:

> But the difficulty with petitioner's position is that he has not preserved that point. On his petition for rehearing to the Circuit Court of Appeals, petitioner did not ask that court to allow him a new trial in order to attack the umpire's report. Nor was that the ground upon which the petition for certiorari was predicated. For review by this Court was sought and granted on the ground that the Circuit Court of Appeals had decided the merits on facts not contained in the record and on a theory which had never been tried by the litigants. There was no intimation in the petition for certiorari that a new trial should be granted in order to afford petitioner an opportunity to attack the competency and accuracy of the umpire's report. It is well settled that this Court confines itself to the ground upon which the writ was asked or granted, the review here being no broader than that sought by the petitioner.

The instant case presents even stronger grounds than set forth in the above cases for the necessity of a further trial since here there has not only been a change of legal position of the Appellate Court making existing issues of fact important for the first time, but there has further been such a complete change of legal position by the Appellate Court that there is, in the pleadings and evidence, a complete void of the very facts necessary to substantiate the law of the case announced by the Appellate Court as decisive of the petitioner's liability. As stated by Mr. Justice Douglas in the *Helis case, supra,* the Court of Appeals has "decided the

merits on facts not contained in the record and on a theory which had never been tried by the litigants."

The denial of a new trial is further, not in accord with the decisions of this and other Courts of Appeals in the following authorities:

Miller Mutual Fire Ins. Assn. v. Bell, 99 F. 2d 289 (C. C. A. 8th 1938);
Southern Railway Co. v. Colonna, 64 F. 2d 237 (C. C. A. 4th 1933), *cert. denied,* 289 U. S. 762 (1933);
Jones v. St. Paul Fire Ins. Co., 108 F. 2d 123 (C. C. A. 5th 1939);
Feldman v. Connecticut Mut. Life Ins. Co., 57 F. Supp. 70 (E. D. Mo. 1944);
3 Moore's Federal Practice (New Edition) §15.11;
36 Corpus Juris Secundum 491, 496 Federal Courts §301.

Aside from these matters, this Court should review the decisions and actions below for the additional reason that they are clearly erroneous and in flat conflict with the laws of the State of Maryland applicable to the facts of this case. Thus, in holding that the liability of the Petitioner arises from failure to give notice of the dangerous conditions in the public highway, the Court of Appeals has to all intents and purposes nullified, or at least completely disregarded, the provisions of the penal code of Maryland prohibiting any person, other than the State Roads Commission, to post notices or warnings within three hundred yards of a State highway under penalty of fine and imprisonment. Art. 89B Annotated Code of Maryland (1939) §85 (Tr. 57).

WHEREFORE your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Fourth Circuit, commanding that Court to

certify and send to this Court for its review and determination, on a day certain to be named therein, a transcript of the records and proceedings herein; and that the mandate of the United States Court of Appeals for the Fourth Circuit be reversed by this Honorable Court with directions that the case be sent back to the United States District Court for the District of Maryland for a new trial and amendment of the pleadings and that your Petitioner have such other and further relief in the premises as to this Honorable Court may seem just.

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